PENGURUSAN DANAHARTA NASIONAL BHD & ORS A

v.

TAN SRI DATO' TAJUDDIN RAMLI (NO 4)

HIGH COURT MALAYA, KUALA LUMPUR B
K ANANTHAM JC
[SUIT NO: D2-22-673-2006]
7 DECEMBER 2009

CIVIL PROCEDURE: *Summary judgment - Settlement agreement - Whether triable issues existed - Defendant executed Settlement Agreement to pay reduced debt but defaulted - Plaintiff terminated Settlement Agreement and reinstated original debt - Plaintiff entitled to default and penalty interest forming part of its claim - Conclusive evidence clause - Whether plaintiff was negligent in selling shares charged to it - Marginal difference in sale proceeds and defendant's valuation of shares - Whether too minimal to attribute negligence on plaintiff* C D

CONTRACT: *Settlement - Settlement Agreement - Breach of agreement - Admissions by defendant in Settlement Agreement - Whether admissions made in the course of negotiations and hence inadmissible - Defendant acknowledged liability for reduced debt but not difference in original indebtedness and reduced debt* E

The defendant executed a facility agreement on 13 July 1994 for a loan from a group of syndicated lenders (the lenders) to finance the F purchase of shares. The defendant failed to service the loan and it became a Non Performing Loan (NPL). The plaintiffs acquired the Lenders' rights under the loan agreements pursuant to the Pengurusan Danaharta Nasional Bhd Act 1988 ("the Danaharata Act") and vesting orders. On 8 October 2001, the defendant G executed a Settlement Agreement with the plaintiffs (the Settlement Agreement), whereby he admitted RM1,410,175,765.43 was due and owing by him to the plaintiffs as at 8 October 2001. The plaintiffs agreed to discount the original indebtedness and required the defendant to pay the reduced debt of RM942,000,000 in the manner H prescribed. The Settlement Agreement provided for the original debt to be reinstated upon default if such default was not remedied by the defendant within a 30 day notice period. The defendant defaulted in payment under the Settlement Agreement and failed to remedy the default. On 27 April 2002, the plaintiffs terminated the I

A Settlement Agreement and demanded payment from the defendant of RM1,611,346,644.44 due as of 27 April 2002 (exh. AM17 to encl. 5). The plaintiffs sold part of the charged shares. The plaintiffs notified the defendant that the outstanding balance due including interest, after providing for the sale proceeds of the shares B was RM589,143,205.57 as of 31 December 2005. The defendant did not challenge the computation of interest in the various statements of account forwarded by the plaintiffs to the defendant. On 11 May 2006, the plaintiffs commenced this action to recover the said sum of RM589,143,205.37.

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Held (allowing the plaintiffs' application to sign final judgment against the defendant with costs of RM350):

(1) Upon the defendant's default of the Settlement Agreement, the plaintiffs pursuant to clause 3.2 are entitled to revert to the D Facility Agreement and sue for amounts due thereunder amounting to RM1,410,175,765.43 as of 8 October 2001 and recover the same with interest from the day after the date of the Settlement Agreement. (para 5)

E **(2)** The plaintiffs were entitled to default and penalty interest forming part of its claim under the terms and conditions of the Facility Agreement. There is no record of the defendant having disputed his liability to pay the various heads of interest. The defendant's claim that he has never admitted the quantum of F the plaintiffs' claim, does not *per se* give rise to a triable issue. A challenge on the ground that the certificate issued under clause 17.1 of the Facility Agreement includes default or penalty interest cannot constitute manifest error since these interests are payable under the agreement. In any event, the G defendant did not allege manifest error in the accounts forwarded to him by the plaintiffs until the commencement of this claim. *Cempaka Finance Berhad v. Ho Lai Ying and Another* (refd). (para 5)

H **(3)** There is no contemporaneous documentary evidence to support the allegations of negligence in the plaintiffs conduct of the sale of the securities. Clause 3.2 conferred upon the plaintiffs very wide latitude when realising the securities. The plaintiffs

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conducted the sale of the securities in a professional manner. The marginal difference in the sale proceeds derived from the sale of the Naluri shares and the defendant's valuation is too minimal to attribute any negligence on the plaintiffs. There is no evidence of any loss suffered by the defendant from the sale of the securities. (para 5)

(4) There was no discrepancy in the statement of account marked exh. AM30 to encl. 5. The only difference in the amounts appearing in exh. AM 17 and exh. AM30 is that the latter included the sale proceeds credited. Since the base figure upon which the interest calculations in both exhibits, is RM1,410,175,765.43 and as the defendant acknowledged this sum as representing the amount due and owing by him to the plaintiffs as of 8 October 2001 in the Settlement Agreement, there was no merit in this complaint. (para 5)

(5) The defendant's admissions in the Settlement Agreement are admissible as they were not made in the course of negotiation but incorporated in an agreement to which he is a party. The defendant during the course of negotiations and thereafter acknowledged his liability for the RM942 million and RM130 million advanced by the plaintiff but not the difference between RM1,410,175,765.43 and RM942 million. Thus, the only issue for consideration is whether the plaintiffs are entitled to their claim under the Facility Agreement. This too is not a triable issue as the plaintiffs are entitled to do so pursuant to clause 3.2 of the Settlement Agreement. Accordingly, leave is granted for the plaintiffs to sign final judgment against the defendant with costs of RM350 to the plaintiffs. *Greenline-Onyx Envirotech Phils, Inc v. Otto Systems Singapore Pte Ltd* (refd). (paras 5 & 6)

Case(s) referred to:

Cempaka Finance Berhad v. Ho Lai Ying and Another [2006] 3 CLJ 544 FC ***(refd)***

Greenline-Onyx Envirotech Phils, Inc v. Otto Systems Singapore Pte Ltd [2007] SGCA 25 ***(refd)***

For the plaintiff - Lim Kian Leong (Low Chi Cheng with him); M/s Lim Kian Leong & Co

For the 1st, 2nd, 3rd, 13th, 14th, 15th & 16th defendants - Tommy Thomas (Ganesan Nethi with him); M/s Tommy Thomas

Reported by Susheila Sreedharan

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JUDGMENT

K Anantham JC:

Background Facts To The Defendant's Indebtedness

B **[1]** The defendant executed a facility agreement on 13 July 1994 to borrow RM1,792,000,000 (original loan) from a group of syndicated lenders (the lenders). This original loan was undertaken in his own name to finance the purchase by him of a 32 % stake in the shares of Malaysia Airlines System Berhad (MAS). The C original loan is evidenced by this facility agreement, three memorandums of deposits and a charge over a cash deposit. By a supplemental agreement, the syndicated lenders and the defendant thereafter agreed to vary some of the terms and conditions of the facility agreement. At all material times from 1994 to 1998 the D defendant failed to service the original loan causing it to become a Non Performing Loan (NPL) in the books of the lenders. In 1988, Danaharta acting pursuant to the powers under the Pengurusan Danaharta Nasional Bhd Act 1988 ("the Danaharata Act") acquired the defendant's NPL from the lenders, including all rights and E securities under the loan agreement. After the acquisition, the plaintiffs issued three Vesting Certificates causing to be vested in them the original loan and rights, title and interest in the assets secured to repay the original loan together with all the contracts.

F **[2]** From 1998 to 2001, the defendant failed to settle his indebtedness to plaintiffs. On 8 October 2001, the defendant executed a settlement agreement with the plaintiffs (the settlement agreement), whereby the defendant admitted that he had been in default of the original loan, and that a sum of RM1,410,175,765.43 G was due and owing by him to plaintiffs as at 8 October 2001. (see recital D and clause 2.1 of the settlement agreement). Under the terms of the settlement agreement, the three plaintiffs agreed to give the defendant a 'hair-cut' by discounting the sum of RM468,175,765.43 from the original indebtedness of RM1,410,175,765.43, H provided he complied strictly with the terms of the settlement agreement. The settlement agreement required the defendant to pay the reduced debt of RM942,000,000 in four installments spread over three years, with interest payable quarterly, in the interim. The settlement agreement provided for the original debt to be reinstated I upon default if such default was not remedied by him within a 30

day notice period. As part of the settlement agreement, the defendant executed a power of attorney; assets schedule and a statutory declaration. One of the terms of the settlement agreement permitted the defendant to redeem the charged shares at a minimum price per share stated therein but otherwise subject to such terms and conditions as shall be imposed by the plaintiffs in their absolute discretion. The minimum redemption price stated for the Naluri shares was RM1.30 per share or the weighted average closing price for the preceding five trading days, whichever is the higher. The price in the case of the shares of Technology Resources Industries Berhad (TRI) was RM3.50 and that for Promet (Langkawi) Resort RM1.95 per share subject to the same provision relating to the weighted average closing price, in the case of the defendant's shares. The sale proceeds arising from any such redemption to be applied to reduce the defendant's indebtedness to the plaintiffs (see clause 7.1 of the settlement agreement). The defendant defaulted in the payment of the quarterly interest payable under the settlement agreement leading to the plaintiffs issuing a demand letter on 11 February 2001. This, in turn, led to the defendant filing High Court Originating Summons number D1-24-66-02 (OS) for a permanent injunction to restrain the plaintiffs from enforcing the settlement agreement and selling the charged shares. The defendant also sought an interim injunction pending the disposal of the prayers in the OS. On 27 March 2002, the plaintiff served a notice of default on the defendant pursuant to the terms of the settlement agreement requiring him to remedy his default within 30 days. On 18 April 2002, the defendant's application for an interim injunction was dismissed by the High Court. On 27 April 2002, the plaintiffs terminated the settlement agreement and demanded that the defendant pay them the sum of RM1,611,346,644.44. This letter of termination included comprehensive details as to how the plaintiff had arrived at the figure of RM1,611,346,644.44 as being the amount due from the defendant to the plaintiff as of 27 April 2002 (see exh. AM17 to encl. 5). On 29 April 2002, the plaintiffs sold part of the charged shares consisting entirely of Technology Resources Industries (TRI) shares at RM2.75 per share resulting in total sale proceeds of RM717,393,875. On 8 May 2002, the defendant withdrew his appeal against the decision of the High Court and the OS. On 20 May 2002, the plaintiff notified the defendant of the sale of the defendant's shares and provided him with another statement

A including comprehensive details about the interest element in the amount due and owing as of 3 May 2002 (see exh. AM18 to encl. 5). On 11 May 2006, the plaintiff commenced this action to recover the said sum of RM589,143,205.37.

B **The Cause of Action**

[3] The plaintiffs' cause of action is under the terms and conditions of the facility and related agreements executed by the defendant with the lenders. The plaintiffs having acquired the lenders' rights under these agreements pursuant to the Danaharta C Act and the vesting orders. Pursuant to clause 3.2 of the settlement agreement, upon default by the defendant in rectifying his default within 30 days of the service upon him of the notice of default, the plaintiffs were entitled to declare the settlement agreement terminated. Upon such termination, the amount defined as D 'indebtedness' under the settlement agreement became immediately due and payable. The term indebtedness in the settlement agreement was defined to mean the sum of RM1,410,175,765.43 as at the date of the settlement agreement and to include without limitation, all further principal, interest whether default, penalty or E otherwise' due and payable by the defendant under the facility agreement. Prior to the commencement of this action, the plaintiffs by letter dated 2 March 2006 notified the defendant of the outstanding balance due from the defendant including by way of interest, after providing for the sale proceeds of the securities. The F amount outstanding as of 31 December 2005 was RM589,143,205.57 (see AM22 to encl. 5). The last letter from the defendant to the plaintiffs apart from requesting that the plaintiffs claim be limited to the amount payable by him under the settlement agreement, did not challenge the computation of interest in the various statements G of account forwarded by the plaintiffs to the defendant (see AM29 to encl. 5).

[4] The defendant contends that he has a genuine defence to the plaintiffs' claims and has raised various issues in the affidavits in H reply filed by him (encls. 453 and 461). Counsel for the defendant submits that these issues are triable issues and leave ought to be granted to the defendant by reason thereof. The alleged triable issues can be summarised to be as follows:

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a) By reason of the termination of the settlement agreement, the plaintiff is estopped from relying on the terms of that agreement. In particular, counsel takes objection to the reliance by counsel for the plaintiff to the acknowledgment of indebtedness in recital D and clause 2.1 of the settlement agreement;

b) Counsel for the defendant submits that any admission of indebtedness on the part of the defendant, did not extend to the quantum of the indebtedness. In particular, objection is taken to the plaintiffs' entitlement to default and penalty interest forming part of the plaintiff's claim;

c) The defendant alleges that the sale consideration obtained by the plaintiffs for the securities held by them is inadequate and this inadequacy is the direct result of negligence on the part of the plaintiffs in the conduct of the sale;

d) No debt due from the defendant because pursuant to the Overriding and Fresh Settlement Agreement, the debt, if any, is due from the Government of Malaysia;

e) The plaintiffs are not properly constituted to bring this claim;

f) The statement of accounts exh. AM30 to encl. 5 only commences as of 31 December 2004, whereas the plaintiffs in their claim purport to claim an amount outstanding as of 15 December 1998. Counsel for the defendant submits that no particulars have been given on how the sum was derived at from 1998 to 2004;

g) The reliance on admissions contained in the defendant's letters are not supportable in law since the letters were all written in the course of negotiations and consequently 'without prejudice'.

[5] I propose in this judgment to deal with the issues raised by counsel for the defendant in the same order in which they have been raised above.

a) It has never been the law that the termination of an agreement precludes the other party to the agreement from referring to the terms and conditions contained therein. The effect, in law, of termination depends on the terms of the agreement. For

example, generally, it is possible to sue for damages for breaches preceding the termination. What is not possible, is to sue for specific performance, after termination of the same. In the case of the settlement agreement, clause 3.2 of the same expressly conferred upon the plaintiffs the right to revert to the Facility Agreement and to sue for amounts due thereunder upon termination, following default by the defendant. The amount due upon such default under the facility agreement was agreed between the parties as amounting to RM1,410,175,765.43 as of 8 October 2001 (see recital D). Accordingly, upon the defendant defaulting under the settlement agreement, in my opinion, the plaintiffs acting pursuant to clause 3.2 of the settlement agreement are entitled to recover the said sum of RM1,410,175,765.43 together with interest from the day after the date of the settlement agreement (see exh. AM17 to encl. 5). The plaintiffs' entitlement to rely on the terms of the settlement agreement, notwithstanding termination, is reinforced by the terms of clause 10.7 of the settlement agreement;

b) Irrespective of whether the defendant has admitted the debt, the plaintiffs' cause of action pursuant to clause 3.2 of the settlement agreement is devoid of a defence. I opine to this effect, because the plaintiffs' letter of termination of the settlement agreement dated 27 April 2002 condescends to particulars of the quantum of the defendant's indebtedness and contains details of the different heads of interest and the amount payable under each head of interest. The plaintiffs being entitled to such interest under the terms and conditions of the facility agreement. There is no record of the defendant having disputed his liability to pay the various heads of interest. On the contrary, the defendant confirmed in writing that his primary objective was to make 'full payment to you' (see exh. AM23 to encl. 5). The letters originating from the defendant suggest that his unhappiness was primarily over the plaintiffs' decision to revert to the sum of RM1,410,175,765.43 after the plaintiffs had agreed to accept the sum of RM942 million under the settlement agreement (see exh. AM26 to encl. 5). Since the plaintiffs are entitled to claim the sum of RM1,410,175,765.43 and pursue their claim under the terms of the facility agreement upon the defendant's default, there is no merit in the defendant's defence to limit the plaintiffs' claim to the sum of RM942 million.

Additionally, the defendant's claim that he has never admitted the quantum of the plaintiffs' claim, does not *per se* give rise to a triable issue. Under clause 17.1 of the facility agreement, a certificate by the agent/manager as to any sum payable to the lenders under the agreement and any other certificate shall, if it contains reasonable details of the basis of calculation be conclusive and binding upon the defendant, in the absence of the manifest error. A clause not dissimilar to this clause was construed by the Federal Court in the case of *Cempaka Finance Berhad v. Ho Lai Ying and Another* [2006] 3 CLJ 544 to be conclusive of the indebtedness of the defendant to the plaintiffs unless the manifest error was evident on the face of the certificate or fraud alleged. In my opinion, a challenge on the ground that the certificate includes default or penalty interest cannot constitute manifest error since they are payable under the agreement. This is not to say that the defendant is without a remedy, as it is always open to him to challenge the validity of such heads of interest in collateral proceedings such as by way of seeking declaratory relief in a counter-claim. In any event, the defendant did not until the commencement of this claim allege manifest error in the accounts forwarded to him by the plaintiff;

c) There is no contemporaneous documentary evidence to support the allegations of negligence in the plaintiffs' conduct of the sale of the securities. In this respect, it must be borne in mind that clause 3.2 conferred upon the plaintiffs a very wide latitude when realising the securities. The contemporaneous documentary evidence, if anything, supports the view that the plaintiffs conducted the sale of the securities in a professional manner. The sale proceeds of RM717,393,875 in respect of the TRI shares were far in excess of the defendant's valuation (see para 10 of encl. 460). The sale proceeds derived from the sale of the Naluri shares were marginally lower only than the valuation of the defendant. The difference is too minimal to attribute any negligence upon the plaintiffs. Accordingly, there is no evidence of any loss suffered by the defendant from the sale of the securities;

d) I do not propose to deal with the issues of the Overriding and the Fresh Settlement Agreement as I have already in an earlier judgment when setting aside the counter-claim, held them to be frivolous;

e) I do not propose to deal with this issue since it was raised before the late Justice Vincent Ng in the OS and dismissed by him. I share His Lordship's view and hold that this is not a triable issue;

f) The statement of account appearing as exh. AM30 to encl. 5 is subsequent in point of time to the letter of termination of 27 April 2002 (see exh. AM17 to encl. 5). The only difference in the amounts appearing in exh. AM17 and exh. AM30 is that the latter exhibit includes amounts credited for the sale proceeds. Since the base figure upon which the interest calculations in both exhibits are based is the sum of RM1,410,175,765.43 and as this figure was acknowledged by the defendant in the settlement agreement as representing the true amount due and owing by him to the plaintiff as of 8 October 2001, I do not see any merit in this complaint. Accordingly, I dismiss counsel's submission that there is a discrepancy in the exh. AM30 to encl. 5;

g) Counsel for the defendant referred me to the Singapore case of *Greenline-Onyx Envirotech Phils, Inc v. Otto Systems Singapore Pte Ltd* [2007] SGCA 25 as authority for the proposition that admissions contained in a letter are deemed to have been made 'without prejudice' so long as the letter was written in the course of negotiations to settle a dispute. This is so, even if the letter is not marked without prejudice. By reason thereof, counsel contended that all the admissions made by the defendant in the settlement agreement and in the letters written by him to the plaintiff are inadmissible. With respect, I disagree. First, the admissions contained in the settlement agreement are clearly admissible since they were not made in the course of negotiation but are incorporated in an agreement to which the defendant is a party. Secondly, in para 16 of the same judgment, the Chief Justice of Singapore rejected the submission of counsel for the defendant that if there was no identifiable sum, there was no acknowledgement of debt. His Lordship opined that an admission of debt by a debtor in a without prejudice letter was admissible but only for the amount admitted. In other words, where a debtor in the course of negotiations admits liability for a smaller sum, then, the creditor is entitled as of right to judgment for the smaller sum

but would have to prove the larger sum, if he elected not to accept the smaller sum offered by the debtor. An examination of exhs. AM23 to AM26 of encl. 5 will reveal that the defendant during the course of negotiations and thereafter always acknowledged his liability for the sum of RM942 million and RM130 million advanced by the plaintiffs on behalf of the defendant to subscribe for the rights issues in respect of TRI shares. In my judgment, applying the principles of law enunciated in the Singapore case to the undisputed facts of this case, the defendant's real defence may be said to be that the plaintiffs cannot base their cause of action on the facility agreement. I opine to this effect because the defendant freely admits liability for the reduced amount of RM942 million and RM130 million but not the difference between RM1,410,175,765.43 and RM942 million (see exh. AM29 to encl. 5). Accordingly, the only issue that merits consideration is whether the plaintiffs are entitled to pursue their claim under the facility agreement. As it is evident, that the plaintiffs are entitled to do so pursuant to clause 3.2 of the settlement agreement, this is not an issue that merits a trial.

[6] Accordingly, I hereby grant leave to the plaintiffs to sign final judgment in terms of prayers (i), (ii) and (iii) of encl. 6. I order the defendant to pay costs of RM350 to the plaintiffs.